82-101

Office - Supreme Court, U.S.
FILED
JUN 28 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

TRAVELERS INDEMNITY COMPANY,

and

THE LIBERAL MARKET, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

MICHAEL R. ECKHART

207 Far Oaks Building
2801 Far Hills Avenue
Dayton, Ohio 45419

ATTORNEY FOR
PETITIONERS

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion and error of law for the Court of Claims to fail to determine the reasonableness of the measures taken by petitioners to prevent or forestall vandals from having access to fuel pumps.

2. Whether the Court of Claims has failed to set a definite standard for review of matters under 33 U.S.C. 1321 (i)(1).

3. Whether the Court of Claims erred in granting summary judgment against petitioners and in favor of respondent after indicating that it needed more facts in order to determine whether petitioner's actions in preventing or forestalling vandals were reasonable.

4. Are the same standards that are applicable to federal district and appellate courts in granting summary judgments applicable to the U.S. Court of Claims when granting summary judgments under its Rule 101, which is like Federal Rules of Court Procedure 56(C).

5. Whether the standard of review under U.S.C. 1321(i)(1) is due care standard like that in tort law or some other standard unlike the tort law standard of due care or ordinary care in doing or failing to do a particular act.

TABLE OF CONTENTS

---

	page
Opinions Below.....	1
Jurisdiction.....	2
Statutes Involved.....	2
Questions Presented.....	5
Statement of the Case.....	6
Reasons for Granting Writ.....	8

Appendix

A. Opinion of The United States Court of Claims.....	1a
B. Stipulation of Agreed Facts..	7a

II.

TABLE OF AUTHORITIES

CASES CITED: page

Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144..... 16

American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theaters, Inc. (1967 CA 2 NY) 388 F.2d 272..... 19

Bell Flower v. Pennise (1977 CA 8 Mo.) 548 F.2d 776..... 18

Chenette v. Trustees of Iowa College (1970 CA 8 Iowa), 431 F.2d 49... 20

Eby v. Rab Realty, Inc. (1974 CA 9 Ariz.) 495 F.2d 646..... 18

Empire Electronics Company v. United States (1972 CA 2 NY) 311 F.2d 175..... 19

Fidelity and Deposit Co. v. Bank of Bladenboro (1979 CA 4 NC) 596 F.2d 632..... 18

Hughes v. American JAW, Ltd. (1976 CA 8 Mo.) 529 F.2d 21..... 18

Insurance Company of North America v. Bosworth Construction Construction Company (1972 CA 5 La.) 469 F.2d..... 21

Jaroslawicz v. Seedman (1975 CA 2 NY) 528 F.2d 727..... 21

CASES CITED: page

Madeirense Do Brasil S/A v. Stulman Emrich Lumber Company (1945) CA 2 NY) 147 F.2d 399..... 15

Manetasy International Petroleum Carriers, Inc. (1976 CA 3 NJ) 541 F.2d 408..... 19

Marsden v. Patane (1967 CA 5 Fla.) 380 F.2d 389..... 20

Morrison v. Nissan Motor Co. (1979, CA 4 Md.) 601 F.2d 139..... 19

Parmelee v. Chicago Eye Shield Co. (1946) CA 8 Mo.) 157 F.2d 582..... 17

Pennsylvania v. Curtiss National Bank (1970 Ca 5 Fla.) 427 F.2d 395..... 17

Proctor Wholesale Co. vs. United, 215 Ct. Cl. 1049..... 10

Sprague v. Vogt (1945 CA 8 Minn.) 155 F.2d 795..... 16

United States v. Diebold, Inc. (1962) 369 U.S. 654, 8 L.Ed 2d 176, 82 S.Ct. 993..... 16

United States v. Perry (1970 CA 9 Cal.) 431 F.2d 1020..... 21

Walling v. Fairmont Cramery Co. (1943 CA 8 Neb.) 139 F.2d..... 16

Webb v. Allstate Life Insurance Company (1976 CA 10 Okla.) 536 F.2d 336... 19

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

TRAVELERS INDEMNITY COMPANY,

and

THE LIBERAL MARKET, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Claims entered on March 30, 1982.

OPINIONS BELOW

The opinion of the United States Court of Claims, not reported, is presented in Appendix A hereto. There are no other Court

opinions in this case.

JURISDICTION

The judgment of United States Court of Claims was entered March 30, 1982, and jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

1.) 33 U.S.C. 1321(i)(1), which provides:

> "(i) Recovery of removal costs. (1) In any case where an owner or operator of a vessel or an onshore facility from which oil or a hazardous substance is discharged in violation of subsection (b)(3) of this section acts to remove such oil or substance in accordance with regulations promulgated pursuant to this section, such owner or operator shall be entitled to recover the reasonable costs incurred in such removal upon establishing, in a suit which may be brought against the United

States Government in the United States Court of Claims, that such discharge was caused solely by (A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party without regard to whether such act or omission of a third party was or was not negligent, or of any combination of the foregoing causes.

(2) The provisions of this subsection shall not apply in any case where liability is established pursuant to the Outer Continental Shelf Lands Act or the Deepwater Port Act of 1974.

(3) Any amount paid in accordance with a judgment of the United States Court of Claims pursuant to this section shall be paid from the funds established pursuant to subsection (k).

2.) Court of Claims Summary Judgment

Rule 101(d) which provides:

(d) Motion and Proceedings Thereon: After a motion for summary judgment has been filed, and after the expiration of the time allowed for a response thereto or for a reply to the response, if any (Rule 52(b)), such motion may (subject to the provisions of Rules 54(b), 146(b)(2), and 166(b)) be assigned to the calendar. (See Rule 14(b)(2).) The judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

QUESTIONS PRESENTED

1. Whether it was an abuse of discretion and error of law for the Court of Claims to fail to determine the reasonableness of the measures taken by petitioners to prevent or forestall vandals from having access to fuel pumps.

2. Whether the Court of Claims has failed to set a definite standard for review of matters under 33 U.S.C. 1321 (i)(1).

3. Whether the Court of Claims erred in granting summary judgment against petitioners and in favor of respondent after indicating that it needed more facts in order to determine whether petitioner's actions in preventing or forestalling vandals were reasonable.

4. Are the same standards that are applicable to federal district and appellate courts in granting summary judgments applicable to the U.S. Court of Claims when granting summary judgments under its Rule 101, which is like Federal Rules of Court Procedure 56(C).

5. Whether the standard of review under U.S.C. 1321(i)(1) is due care standard like that in tort law or some other standard unlike the tort law standard of due care or ordinary care in doing or failing to do a particular act.

STATEMENT OF THE CASE

The basic facts in this case were stipulated by the parties. This was an original action under 33 U.S.C. 1321(i)(1) brought in the United States Court of Claims.

Petitioner, The Liberal Market, Inc., owned a meat distribution plant. The plant consisted of a large building and parking lot surrounded by a chain-link fence approximately eight to ten feet high. There were railroad tracks parallel to the fence on the south side of the plant and another set of tracks on the north side. There were some residences in the area. At the back of the meat distribution plant there were two diesel fuel pumps inside the fence. On the night of December 11, 12, 1979, unknown vandals

cut through the chain-link fence surrounding the plant, disengaged the fuel nozzles from the diesel fuel pumps, locked the nozzles in the on position thereby allowing diesel fuel to flow out of both nozzles. At the time of the break-in the gates in front of the plant were locked. Liberal had employees at the plant for approximately 21 of any 24 hour period.

As a result of the nozzles being left on, several thousand gallons of diesel fuel ran out of the pumps and into a local creek. Petitioners employed certain companies to perform services to clean-up the diesel spill. Petitioners incurred costs of the amount of $18,048.52 for the clean-up. Petitioner Travelers Indemnity Company was petitioner's Liberal insurer and paid Liberal the sum of $18,048.52 to cover the cost of clean-up. In effect, upon payment by Travelers to Liberal, Travelers became subrogated to Liberal's right

to recovery and Liberal was obligated to reimburse Travelers if Liberal recovered any sum of money in any court action.

An agreed stipulation of facts is attached as Appendix B.

The case was submitted to the Court of Claims on petitioners' motion for summary judgment and on the cross motion for summary judgment by respondent. The Court of Claims issued its decision on March 30, 1982, and granted respondent's motion for summary judgment and denied petitioners' motion for summary judgment and the petition was dismissed. It is from this final order of the Court of Claims that the petitioners have prosecuted its appeal to the Supreme Court.

REASONS FOR GRANTING THE WRIT

If there is an oil spill and a party is ordered by government authorities to clean it up, 33 U.S.C. 1321(i)(1) authorizes a party to sue the United States in the Court of Claims

in order to be reimbursed for costs incurred in removing an oil spill upon establishing that the original discharge of oil was "caused solely by (a) an act of God, (b) an act of War, (c) negligence on the part of the United States Government, or (d) an act or omission of a third party without regard to whether such act or omission was or was not negligent, or of any combination of the foregoing causes."

At issue is whether a "free-wheeling" Court of Claims can make a decision contrary to the facts and law. The Supreme Court's lack of review of Court of Claims decisions has led to a certain degree of "free-wheeling". (See American Bar Association Journal for May, 1982 article regarding National Court of Appeals.) The facts of the case provide an excellent reason for the Supreme Court to review a decision of the Court of Claims and rein in the Court of Claims.

In this particular case, (d) above is the

applicable provision. The question is whether a plaintiff in the Court of Claims must establish that he acted with ordinary due care, as in the tort law standard of due care, or whether a different standard is applicable to cases under 33 U.S.C. 1321(i)(1). The Court of Claims decision in this case stated at page 3 as follows:

> "In the present case, where plaintiff's failure to act has been called into question, it must show that it took adequate precautions to prevent and forestall the vandals and, thereby, satisfy its legal duties to act. Proctor Wholesale Co. v. United States, 215 Ct. Cl. 1049, 1050 (1978)."

It is unclear from the quoted language exactly what legal standard the Court of Claims relied on in deciding the case and it is unclear what burden of proof standard was used. It all depends on how the phrase "caused solely by..." was construed. The potential liability of the United States is great and, therefore, the standard should be certain.

If the standard is the ordinary or due care

standard established in tort law throughout the United States, then it is the Court of Claims's responsibility to determine in each factual situation whether that standard was met on the part of the claimant seeking reimbursement from the government. Thus, it is imperative that the Supreme Court definitely set forth a standard by which the Court of Claims must adjudicate claims under this section. This section is one of the most litigated sections of 33 U.S.C. 1321 because it permits parties to sue the government for cleaning up oil spillages on land, in the ocean or on any body of water.

Petitioners submit that the Court of Claims totally abandoned its judicial duty in deciding this case in the manner it did. The issue presented to the Court of Claims for determination was whether under the facts and circumstances petitioners acted in a reasonable manner and took adequate precautions to pre-

vent and forestall vandals from breaking into the meat plant grounds. The court indicated, beginning at page 3 of its decision, as follows:

> "If the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail. We do not judicially know, and the stipulation does not tell us what precautions are normally expected of persons having on their premises pumps to feed petroleum products into the fuel tanks of business vehicles."

The court further stated at page 4:

> "Plaintiff puts a burden on our unaided perception of what is reasonable, that is simply is unable to bear."

The pertinent facts of this case were stipulated. Petitioners argued that under the facts as presented to the Court they acted reasonably and took adequate steps to prevent vandalism. Whereas the respondent, government, construed the facts as indicating that petitioners did not take reasonable and adequate precautions to prevent or forestall vandals from breaking into the premises and to the pumps.

Thus, the issue was clear: Were petitioners' actions reasonable and were adequate precautions taken to forestall vandalism? The Court of Claims totally avoided deciding this issue and indicated that there were inadequate facts upon which to make a decision of reasonableness and adequate precautions taken. Nevertheless, the court, even though indicating it did not have sufficient facts to make a determination of reasonableness and adequate precautions taken still decided the case against petitioners and dismissed the case.

Petitioners would submit that an action brought under 33 U.S.C. 1321(i)(1) is essentially a negligence type action based on tort principles of ordinary due care. Thus, with this analysis, petitioners only need show that they were not in some manner contributorily negligent which would bar recovery. In order to render a decision in favor of respondent, the Court of Claims would have had to deter-

mine that petitioners were, in some manner, contributorily negligent, and, therefore, barring petitioners' claim for payment. Petitioners would contend that there was a genuine issue of fact: That being whether under the facts and circumstances petitioner's conduct was reasonable or comported with the tort concept of due care.

There was a genuine issue of law as to what standard was to be applied against petitioners in this area. The Court should have compared at least some standard of conduct against petitioner's actions.

The Court could only decide the case on the facts before it. This is did not do. This is shown by the Court's statement on page 3 that:

> "If the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail. We do not judicially know, and the stipulation does not tell us what precautions are normally expected of persons having on their premises pumps to feed petroleum products into the fuel tanks of business vehicles."

The thrust of petitioner's argument is that the

Court was to decide whether in the facts presented petitioners took reasonable and adequate precautions or measures to prevent vandalism to the pumps. A ruling on summary judgment is to be made on record actually present, not on one potentially possible. Madeirense Do Brasil S/A v. Stulman - Emrich Lumber Company (1945) CA. 2 NY.) 147 F.2d 399, cert. den. 325 U.S. 861.

The basis for determining whether the Court shall issue a summary judgment is contained under Rule 101(d) of the Court of Claims rules. This rule is like the summary judgment procedure contained in Federal Rule of Civil Procedure 56(C). In particular, Rule 101(d) states that "the judgment sought shall be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment of law."

The Supreme Court has not ruled as to

whether the summary judgment procedure of the Court of Claims must be identical to the procedures and conditions for granting judgments under the Federal Rules of Civil Procedure 56(C). If the same, then the Court of Claims' decision was contrary to established guidelines in deciding summary judgments. The Supreme Court has stated regarding summary judgments that a party moving for summary judgment has the burden of showing absence of a genuine issue as to any material fact, and inferences to be drawn from underlying facts must be viewed in light most favorable to opposing party. Adickes v. S.H. Kress & Co. (1970) 398 U.S. 144, 26 L. Ed. 2d 142, 90 S.Ct. 1598; United States v. Diebold, Inc. (1962) 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993.

It has been stated that all doubts are resolved against the moving party. Walling v. Fairmont Cramery Co. (1943 CA 8 Neb.) 139 F.2d 318; Sprague v. Vogt (1945 CA 8 Minn.) 155

F.2d 795; Parmelee v. Chicago Eye Shield Co. (1946 CA 8 Mo.) 157 F.2d 582. The party opposing motion should be given benefit of every reasonable inference that can be made of evidence in his favor. Pennsylvania v. Curtiss National Bank (1970 CA 5 Fla.) 427 F.2d 395.

In the instant case, the Court of Claims, in its order and decision, has in effect admitted that it did not feel it had adequate facts to decide the key issue of reasonableness and adequate precautions taken but yet rendered a decision against petitioners. Thus, there was a genuine issue as to whether respondent was entitled to judgment as a matter of law on the facts.

It has been held that tort actions are usually not appropriate for disposition for summary judgment since tort actions generally encompass a multitude of factual issues and abstract concepts which become elusive when applied to bearing concrete factual situations.

Hughes v. American JAW, Ltd. (1976 CA 8 Mo.) 529 F.2d 21. The court may render summary judgment in tort or other cases only if after reviewing evidentiary materials in the light most favorable to party opposing motion and giving that party benefit of all inferences reasonably deductible from evidence, the court is convinced upon the trial of the case a verdict in favor of moving party would have to be granted. Bell Flower v. Pennise (1977, CA 8 Mo.) 548 F.2d 776.

Issues of negligence and contributory negligence are "not ordinarily susceptible of summary adjudication under F.R.C.P. 56". Fidelity and Deposit Co. v. Bank of Bladenboro (1979 CA 4 N.C.) 596 F.2d 632. It is the court's duty to ascertain what facts remain in contention even though cross motions are made for summary judgment. Eby v. Rab Realty, Inc. (1974 CA 9 Ariz.) 495 F.2d 646.

Where different inferences can be drawn from the facts, summary judgment should not

be entered. American Mfrs. Mut. Ins. Co. v. American Broadcasting Paramount Theaters, Inc. (1967 CA 2 N.Y.) 388 F.2d 272, later appeal (CA 2 N.Y.) 446 F.2d 1131, cert. den. 404 U.S. 1063.

Where different ultimate inferences of liability may be properly drawn from established facts, case is not one for summary judgment. Webb v. Allstate Life Insurance Company (1976 CA 10 Okla.) 536 F.2d 336; Morrison v. Nissan Motor Co. (1979, CA 4 Md.) 601 F.2d 139.

Cross motions for summary judgment do not warrant the court granting summary judgment unless one of the movants is entitled to judgment as a matter of law. Manetasv International Petroleum Carriers, Inc. (1976 CA 3 N.J.) 541 F.2d 408.

Only where one inference could reasonably be drawn from undisputed evidentiary facts would summary judgment be possible. Empire Electronics Company v. United States (1972 CA 2 N.Y.) 311 F.2d 175.

Even where facts bearing upon issue of negligence are undisputed, if reasonable minds could reach different conclusions and inferences from such facts, issue must be submitted to trier of fact. Marsden v. Patane (1967 CA 5 Fla.) 380 F.2d 489.

Evaluative judgment between two rationally possible conclusions from established facts cannot be engaged in on motion for summary judgment; only where facts supportive of summary judgment can be held to have so unambiguously established actualities of situation as to leave no basis of substance for dispute as to their reality or as to conclusion required from them is summary judgment entitled to be entered. Chenette v. Trustees of Iowa College (1970 CA 8 Iowa), 431 F.2d 49. Summary judgment should not be granted where contradictory inferences may be drawn from undisputed evidentiary facts, even though facts are undisputed, summary judgment is inappropriate if competing reasonable inferences may be drawn

as to any material factual issue. United States v. Perry (1970 CA 9 Cal.) 431 F.2d 1020. Insurance Company of North America v. Bosworth Construction Company (1972 CA 5 La.) 469 F.2d 1266.

It has been held that the responsibility of a district judge on motion for summary judgment is merely to determine whether there are issues to be tried, rather than to try issues themselves, via affidavit and summary judgments cannot be sustained merely because judge believes that party against whom it is entered is unlikely to prevail on merits at trial. Jaroslawicz v. Seedman (1975 CA 2 N.Y.), 528 F.2d 727.

Petitioners request that this Court acting in the nature of a reviewing Court, as a court of appeals would toward district court, review the facts, set a standard and either determine that the actions of petitioners were reasonable and adequate and enter judgment accordingly, or

remand to Court of Claims for a trial or for reconsideration of its summary judgment decision in light of the principles for review of such cases as may be enunciated by this Court.

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 469-80L

TRAVELERS INDEMNITY CO.,

and

THE LIBERAL MARKET, INC.,

v.

THE UNITED STATES

O R D E R

(Filed March 30, 1982)

This case is before the court on cross motions for summary judgment, but the parties have stipulated the facts and wish us to decide on the basis of the stipulation. Both sides have filed briefs but waive oral argument. We may therefore dispose of the case without having to consider if there is any issue of relevant fact.

The suit is to recover the cost of cleaning up an oil spill and we have jurisdiction under 33 U.S.C. Section 1321. Liberal Market, Inc. (Liberal), is a wholesale meat distributor. Under a policy of insurance, Travelers has reimbursed the actual cost that Liberal incurred, $18,048.57. Defendant, by the Environmental Protection Agency, ordered the cleanup. The spill was of diesel fuel from two pumps and corresponding tanks on Liberal's premises, used to fuel Liberal's tractor trailers and others rented from Avis and used in Liberal's business. The oil flowed into Little Beaver Creek, a tributary of the Ohio River, which is part of the navigable waters of the United States.

Liberal had a chain link fence entirely around its premises, including a gate which was locked when the spill was caused. "Vandals" cut an opening in the fence in the brief period from 2 to 5 a.m. when no Liberal employees were on the premises. The vandals left the

two pumps delivering the diesel fuel on the ground. Liberal admits in the stipulation that a switch in the plant boiler room had to be in the "on" position to activate the two pumps and was left in that position during the closed hours when nobody employed by Liberal was on the plant premises, according to Liberal's usual practice. The plant was on formerly swampy ground, built up to receive the structure, but adjacent to the creek, into which any spill would naturally flow.

The statutory scheme is for absolute liability. However, if an owner or operator of an "onshore facility" from which oil has been "discharged" cleans it up according to regulation, he can recover against the United States in a suit in this court "upon establishing" that the spill was "caused solely by" an act or omission of a third party. 33 U.S.C. Section 1321 (i)(1). This language cannot be taken literally in that, of course, anyone who

placed oil on his premises could never show that the cause of a spill is "solely" the act of another, for obviously the act of placing the oil there contributed. To effectuate the obvious congressional intent to allow some mitigation of liability, the phrase "caused solely by" means that an owner or operator will be excused from liability in those situations which are complete beyond his control. In other words, responsibility for the spill must be entirely that of the third party, here the vandals. Unless the act or omission to perform a legal duty of an owner or operator is so indirect or insubstantial as not to constitute a contributing cause of the spill, he will be unable to shift responsibility wholly onto the vandals. In the present case, where plaintiff's failure to act has been called into question, it must show that it took adequate precautions to prevent and forestall the vandal's acts and, thereby, satisfied its legal duty to act. Proctor Whole-

sale Co. v. United States, 215 Ct.Cl. 1049, 1050 (1978).

If the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail. We do not judicially know, and the stipulation does not tell us what precautions are normally expected of persons having on their premises pumps to feed petroleum products into the fuel tanks of business vehicles. Obviously, conditions being unfortunately what they are today, vandals must always be expected. The stipulation does not suggest any reason why they might not have been anticipated in the vicinity of Liberal's plant. The switch in the boiler room obviously provided the means for an added precaution Liberal failed to take. The stipulation does not tell us whether such switches are normal as parts of facilities to dispense gasoline and diesel fuel, whether if so it is a customary precaution to turn off the switch when the facility is not in use, or whether a

complete chain link fence circumscribing the facility, with a locked gate, is considered sufficient. With such a deficient stipulation the party having the burden of proof must lose. Without our meaning to intimate that any particular kind of evidence would suffice, there might for example be municipal ordinances, underwriter's rules, or other standards that would be at least suggestive; here we are neither told there were none, or if there was, what they were. Plaintiff puts a burden on our unaided perception of what is reasonable, that it simply is unable to bear. We do not even get to defendant's other contentions that plaintiff reasonably should have provided a dike or berm around the pump area.

Accordingly, defendant's motion for summary judgment is granted, plaintiff's motion for summary judgment is denied, and the petition is dismissed.

BY THE COURT
/s/ PHILIP NICHOLS, JR.
Judge

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 469-80

TRAVELERS INDEMNITY COMPANY,

and

THE LIBERAL MARKET, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION OF AGREED FACTS

Plaintiffs Travelers Indemnity Company and the Liberal Market, Inc. and defendant United States, by and through their undersigned counsel, hereby stipulate and agree as follows:

1. Plaintiff, Liberal Market, Inc. owns a meat distribution plant on Grange Hill Road, in Beaver Creek, Ohio. The meat distribution

plant consists of a large building and parking lot surrounded by a chain link fence approximately 8 to 10 ten high containing several gates. There are railroad tracks paralellel to the fence on the south side of the plant; another set of tracks dead ends at one of the front gates. There are some residences in the area. At the back of the meat distribution plant, there are two diesel fuel pumps inside the fence.

2. During the night of December 11 - 12, 1979, unknown vandals cut through the chain link fence surrounding Liberal's meat distribution center, disengaged the fuel nozzles from the diesel fuel pumps at the back of the plant, locked the fuels nozzles in the "on" position, thereby allowing diesel fuel to flow out of both nozzles. The gates in the fence had been locked, according to Liberal's standard procedure.

3. During the night of December 11 - 12,

pumps in the "on" position 24 hours per day.

12. Liberal purchased diesel fuel for one of the two tanks and used that fuel to fill its trailer refrigeration units.

13. Up to and including December 12, 1979, Avis Leasing Corporation leased trucks to Liberal for Liberal's meat deliveries.

14. Avis purchased diesel fuel for the second tank owned by Liberal and Avis used that fuel to fill the tractors it leased to Liberla.

15. Up to and including December 12, 1979, no one, other than Liberal's employees, possessed keys to the locks on the gates and doors at the meat distribution center.

16. Although Avis was responsible for purchasing fuel and filling its leased trucks, Liberal was responsible for securing the diesel fuel pumps.

17. From at least 1974 up to and including December 12, 1979, it was normal practice for Liberal to leave the pump used by Avis un-

United States in the instant action.

7. The two diesel fuel pumps from which the discharge occurred are connected to two underground fuel tanks. The pumps and tanks are owned by plaintiff Liberal Market, Inc. and are within the confines of Liberal's property at the Liberal Meat Distribution Center on Grange Hill Road, Beaver Creek, Ohio.

8. These fuel pumps and tanks constitute an "onshore facility" within the meaning of 33 U.S.C. Section 1321(a)(10).

9. Liberal Market, Inc. is the "owner or operator" of the above described onshore facility. 33 U.S.C. Section 1321(a)(6).

10. The fuel pumps are activated by an electrical switch located in the boiler room of the meat processing building at the Liberal meat distribution center.

11. Up to and including December 12, 1979, it was Liberal's normal procedure to leave the electrical switch activating the fuel

1979, approximately 7,000 gallons of diesel fuel ran out of the two pumps and into Little Beaver Creek.

4. Little Beaver Creek flows into Beaver Creek which flows into the Little Miami River, which is a navigable water of the United States, and is a tributary of the Ohio River.

5. Liberal Market, Inc. employed O.H. Material's Company, Liquid Waste, Inc. and Jack L. Woody Excavating to perform services to clean up the spilled oil. Liberal incurred cost in the amount of 18,048.52 in cleaning up the spilled oil. The clean-up operation was substantially completed within three days.

6. Plaintiff Travelers Indemnity Company was Liberal's insurer and paid Liberal the sum of 18,048.52 to cover the cost of clean-up. Liberal gave to Travelers a loan receipt which obligates Liberal to reimburse Travelers for the sum of the loan in the event that Liberal were to recover any money from the

locked.

18. It was Liberal's normal practice that the first person on the day shift would arrive at the plant at approximately 5:00 a.m. and the last person on the night shift would leave the plant at approximately 2:00 a.m.

19. Although there are lights located at the back of the meat processing plant, these lights were not normally left on overnight and were not on the night of December 11 - 12, 1979. There normally were lights on in the parking lot at the front of the plant.

20. Liberal did not employ security guards at its meat distribution center up to and including December 12, 1979.

21. Although Liberal had install an alarm system at the meat distribution center, it was connected to the building only and was not designed to be activated by a person's tampering with the fence.

22. The property upon which the meat dis-

tribution center is located was originally a marshy low-lying area. Liberal raised the elevation of its property by approximately four feet in order to build its facility.

23. Liberal's pumps are located at the back of its property approximately five feet from the fence.

24. The property declines sharply just outside the fence at the back of the property. This decline allowed the oil spilled on December 12, 1979 to enter the navigable waters of the United States.

25. Liberal has never had an oil containment system at its meat distribution cneter; nor are there dikes or berms surrounding its property or the area in which the pumps are located.

Dated is 28th day of August, 1981.

/s/ NANCY J. MARVEL
Attorney, Environmental Defense Section - Room 2647
Land and Natural Resources Division
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Counsel for Defendant United States

/s/ MICHAEL R. ECKHART
2801 Far Hills Avenue
Dayton, Ohio 45419

Counsel for Plaintiffs Travelers Indemnity Company and the Liberal Market, Inc.

Office-Supreme Court, U.S.
FILED
OCT 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-101

In the Supreme Court of the United States

OCTOBER TERM, 1982

TRAVELERS INDEMNITY COMPANY AND THE LIBERAL MARKET, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Anglo Fabrics Co. v. *United States*, No. 279-77 (Ct. Cl., Mar. 20, 1981) 2

Chicago, M., St. P. & P. R.R. v. *United States*, 575 F. 2d 839 2

City of Pawtucket v. *United States*, 546 F. 2d 430 2

Proctor Wholesale Co. v. *United States*, 215 Ct. Cl. 1049 2

Union Petroleum Corp. v. *United States*, 651 F. 2d 734 2

United States v. *W.T. Grant Co.*, 345 U.S. 629 3

Statutes:

Clean Water Act, Section 311(i)(1), 33 U.S.C. 1321(i)(1) 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-101

TRAVELERS INDEMNITY COMPANY AND THE LIBERAL MARKET, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners assert that the Court of Claims erred in granting summary judgment for the government after the parties stipulated to the facts.

1. Petitioners brought this suit against the United States in the Court of Claims, seeking to recover the expenses of cleaning up an oil spill from the plant of petitioner The Liberal Market in Beaver Creek, Ohio. The spill resulted from vandals breaking into the plant and activating fuel pumps, which pumped oil onto the ground. The oil then ran into navigable waters (Pet. App. 2a). Petitioners sought to recover their cleanup expenses from the United States under Section 311(i)(1) of the Clean Water Act, 33 U.S.C. 1321(i)(1), which allows the owner or operator of an onshore facility from which oil has been discharged to recover from the United States the reasonable costs

incurred in cleaning up the discharge if the owner or operator can prove that the discharge was caused solely by the acts of a third party.

The parties stipulated to the facts (Pet. App. 7a-14a). The Court of Claims found, on the stipulated facts, that petitioners had failed to establish that they had taken reasonable precautions to guard against a foreseeable act of vandalism and that petitioners had therefore failed to meet their burden of proving that the oil discharge occurred *solely* as a result of the acts of a third party. The court accordingly granted the government's motion for summary judgment and denied petitioners' cross-motion.

2. The Court of Claims stated that the applicable standard of care required petitioners to take the precautions that were "reasonably required" to forestall the vandals' acts (Pet. App. 4a-5a). Petitioners do not appear to challenge this standard,[1] which has been applied in a long line of Court of Claims cases dealing with oil spills caused by vandals. *Anglo Fabrics Co.* v. *United States*, No. 279-77 (Ct. Cl. Mar. 20, 1981); *Union Petroleum Corp.* v. *United States*, 651 F. 2d 734 (Ct. Cl. 1981); *Proctor Wholesale Co.* v. *United States*, 215 Ct. Cl. 1049 (1978); *Chicago, M., St. P. and P. R.R.* v. *United States*, 575 F.2d 839 (Ct. Cl. 1978); *City of Pawtucket* v. *United States*, 546 F. 2d 430 (Ct. Cl. 1976).

Instead, petitioners assert that the Court of Claims "totally avoided deciding" whether The Liberal Market's "actions [were] reasonable and were adequate precautions taken to forestall vandalism" because, according to petitioners, the court "indicat[ed that] it did not have sufficient

---

[1]See, *e.g.*, Pet. 14 (issue is whether "petitioner's conduct was reasonable or comported with the tort concept of due care").

facts to make a determination of reasonableness" (Pet. 13).[2] In fact, the court concluded that "[t]he stipulation does not suggest any reason why [vandalism] might not have been anticipated in the vicinity of Liberal's plant" (Pet. App. 5a). Moreover, the court ruled, nothing in the stipulation explained why Liberal was not reasonably required to take an obvious precaution — turning off a master switch to the pumps located in a place that was inaccessible to the vandals (*id.* at 5a-6a). The court stated that "[i]f the stipulation fails to show that the precautions were all that was reasonably required, the claim must fail" (*id.* at 5a); that is, petitioners had the burden of proof and they failed to meet it.

At no time below did petitioners claim that there was a genuine issue as to any material fact or that summary judgment was for any reason inappropriate. Petitioners did not attempt to indicate that an issue of fact existed by adding exhibits or affidavits after the government's motion for summary judgment was filed. Evidence that might have shown that Liberal took all reasonable precautions could easily have been introduced, if it existed; the court suggested, as examples, "municipal ordinances, underwriter's rules, or other standards that would be at least suggestive" (Pet. App. 6a). Having failed to produce such evidence when they had an opportunity to do so, petitioners are precluded from now claiming they were deprived of a trial on some material issue of fact. See, *e.g.*, *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 635 (1953).

---

[2]Petitioners also urge that this Court "review the facts * * * and * * * determine that the actions of petitioners were reasonable and adequate and enter judgment accordingly" (Pet. 21). But that fact-bound issue plainly does not merit consideration by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

DOJ-1982-10